

*United States Court of Appeals
for the Second Circuit*



APPENDIX

ORIGINAL

75-6095

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
PLS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
against

LOUIS D. DEBERADINIS, JR.,

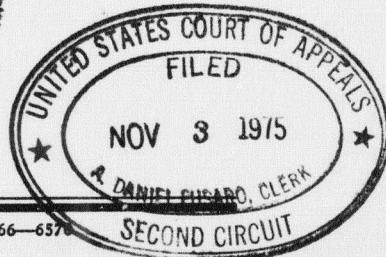
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

APPENDIX

TOBIAS WEISS,
Attorney for Defendant-Appellant
123 Prospect Street
Stamford, Connecticut 06901

203-348-6196



PAGINATION AS IN ORIGINAL COPY

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Docket Entries.

DATE	PROCEEDINGS
1970	
1/23	Complaint filed. Summons issued and together with copies of same and of complaint, handed to the Marshal for service.
2/16	Marshal's Return Showing Service filed—Summons & Complaint.
1971	
JUL 12 1971	Notice Under Rule 15 mailed Counsel.
8/4	Letter from U.S. Attorney's Office re Rule 15 Notice requesting case remain open on the docket, filed.
8/13	Case continued on the docket.
AUG 30 1972	Notice Under Rule 15 mailed Counsel.
9/6	Letter from U.S. Attorney's Office re Rule 15 Notice requesting case remain open on the docket, filed.
AUG 31 1973	Notice Under Rule 15 mailed Counsel.
9/18	Request that case remain open on Court docket—case should be resolved within six months, filed by U.S. Atty. Order entered thereon approving same. Clarie, J. M-9/18/73. Copy to U.S. Atty.
12/20	Motion for Extension of Time to Feb. 25, 1974 in which to Respond to Interrogatories and Notice of Motion, filed by plaintiff.
1974	
1/7	Objection to Extension of Time, filed by defendant.
"	Hearing on Plaintiff's Motion for Extension of Time. Decision Reserved. Clarie, J. M-1/9/74.
1/11	Interrogatories filed by defendant.

Docket Entries.

DATE	PROCEEDINGS
1/14	Plaintiff's Motion for Extension of Time, endorsed as follows: "The plaintiff-government's motion for an extension of time in which to respond to interrogatories is granted to Feb. 8, 1974. Counsel should make a special effort to provide this information promptly so that this case may be concluded; so ordered." Clarie, J. M-14/74. Copies mailed.
2/13	Motion to Preclude Plaintiff for Failure to Answer Interrogatories, filed by defendant.
2/19	Defendant's Motion to Preclude Plaintiff for Failure to Answer Interrogatories "Off by agreement." Clarie, J. M-2/22/74 Copies mailed.
3/5	Answers to Interrogatories, filed by plaintiff.
3/8	Interrogatories, filed by defendant.
3/29	Answers to Interrogatories, filed by Plaintiff.
3/19	Court Reporter's Notes of proceedings held on Jan. 7, 1974, filed at Hartford. Sperber, R.
8/28	Motion for Summary Judgment, Notice of Motion, Affidavit of Louis DeBerardinis, Jr. in Support of Motion and Affidavit of Tobias Weiss in Support of Motion, filed by defendant.
9/6	Memorandum in Support of Motion for Summary Judgment, filed by defendant.
9/10	Order entered on letter of Atty. Tobias Weiss' requesting an extension of time to

Docket Entries.

DATE	PROCEEDINGS
	file a reply memorandum, as follows: "The defendant's request for time to file a reply memorandum is granted; and the case is assigned for hearing." Clarie, J. M-9/10/74. Copies mailed.
9/19	Memorandum in Opposition to Defendant's Motion for Summary Judgment, filed by plaintiff.
9/30	Hearing on Defendant's Motion for Summary Judgment. Motion to Admit Morrow as a visiting attorney, filed by Asst. U.S. Atty Cohn. Reply Memorandum filed by Defendant. Decision Reserved Clarie, J. M-10/2/74
1975	
1/6	Ruling on Defendant's Motion for Summary Judgment, entered. The Court, having reviewed the defendant's affidavits, exhibits, and memoranda, together with all the papers, finds that genuine issues of material fact remain to be decided and that summary judgment is, therefore, inappropriate. The defendant's motion for summary judgment is accordingly denied and the case is assigned for trial at Bridgeport as the first case on the court calendar. So ORDERED. Clarie, J. M-1/7/75 Copies to U.S. Atty, Atty Morrow of Dept. of Justice and Atty Weiss.
10/75	Placed on trial list.
/16	Answer, filed by defendant.
/27	Court Reporter's Transcript of proceedings held on Sept. 30, 1974, filed, Sperber, R.
2/3	Court Trial Commences. Plaintiff's Exhibits 1 thru 6 marked for identification;

Docket Entries.

DATE

PROCEEDINGS

1 thru 5 filed as full exhibits. Plaintiff rests. Defendant makes a motion to dismiss. Court denies motion. Defendant sworn and testifies in his own behalf. Defendant's Exhibits A, A-1, A-2, B thru G, filed; H thru T marked for identification. Plaintiff objects to first 4 questions in Exhibit T. Court overrules objections. Defendant's Exhibits T & U filed. Plaintiff's Exhibit 6 filed; 7 & 8 marked for identification, then filed as full exhibits. Defendant's Exhibit V marked for identification; W & Y filed. Plaintiff's Exhibit 9 filed. Defendant rests. Plaintiff given 3 weeks to file brief; Defendant 3 weeks thereafter. Court adjourns at 3:35 P.M. Levet, J. M-2/3/75

3/12 Court Reporter's Transcript of Proceedings of February 3, 1975, filed at Bridgeport. Beecher, R.

4/22 Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed.

/9 Proposed Findings of Fact and Conclusions of Law Submitted by Defendant, filed.

“ Defendant's Memorandum of Law, filed.

“ List of Defendant's Exhibits, filed.

/30 Opinion, Findings Of Fact and Conclusions of Law, filed, at Bridgeport. Plaintiff, United States of America, is entitled to judgment against defendant, Louis D. De Berardinis, Jr., for taxes assessed in the sum of \$34,055.59, plus interest according to law and to costs. Settle judgment promptly in Bridgeport upon notice pursuant hereto. Levet, J. Copies mailed. M-6/11/75

Docket Entries.

DATE	PROCEEDINGS
8/1	Ordered, Adjudged and Decreed that the Plaintiff, U.S.A. shall have final judgment against Louis D. Deberadinis, Jr. pursuant to Sec. 6672 of IRS Code of 1954, as a responsible officer of McFaddin Express, Inc. for his failure to collect and pay U.S.A. the sum of \$34,055.59 in withholding taxes for the period of 4/1/59 through May 21, 1959 and interest on the above sum in the amount of \$29,830.82 computed at 6% for the period of January 13, 1961 through June 30, 1975 and at 9% for the period of July 1, 1975 through July 31, 1975 pursuant to 26 U.S.C. § 6601, in the total amount of \$63,886.41 and that interest shall accrue on this judgment as provided by law. M 8/4/75. Copies Mailed. (Levet, Richard) (Markowski, C.)
/11	Notice of Appeal, filed by Defendant. Copies mailed. Copy of Notice and of Docket Entries mailed to U.S.C.A.
"	\$250.00 Cash Bond on Appeal deposited into the Registry of the Court.

**Trial Court's Opinion, Findings of Facts and
Conclusions of Law.**

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 13664

UNITED STATES OF AMERICA,

Plaintiff,

against

LOUIS D. DE BERADINIS, JR.,

Defendant.

APPEARANCES:

GERALD C. MILLER, Esq.
Tax Division
United States Department of Justice
Washington, D.C. 20530
Attorney for the United States of America, Plaintiff

TOBIAS WEISS, Esq.
123 Prospect Street
Stamford, Connecticut 06901
Attorney for Louis D. De Berardinis, Jr., Defendant

LEVET, D. J.*

This is an action involving a claim of "100% penalties" pursuant to §§ 6672, 6671(b), Internal Revenue Code of 1954.

The United States has made 100% penalty assessments against Louis D. De Berardinis, Jr. ("De Berardinis") by

* Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

*Trial Court's Opinion, Findings of Facts and
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reason of allegedly unpaid income withholding and Social Security" "FICA") taxes due for the second quarter of 1959 in the sum of \$34,055.59 from McFaddin Express, Inc. ("McFaddin").

The complaint filed on January 23, 1970 bases this 100% penalty tax assessment on the ground that De Berardinis was a "responsible officer" of McFaddin and that he had "willfully" failed to pay the above-mentioned taxes.

Defendant filed his answer to the complaint on January 16, 1975, denying the substantive allegations of the government. Defendant asserts that (1) the complaint was not timely filed; (2) the government improperly applied prior payments to other taxes due from McFaddin rather than to the taxes for which defendant has been penalized; and (3) the government failed to enforce its tax liens on the McFaddin assets after they were transferred to Adley Trucking Company ("Adley") and while said assets remained sufficient to cover any tax deficiencies of McFaddin.

The statutes involved are §§ 3102(a), 3402(a), 6502(a), 6671(b), 6672 and 7501 of the Internal Revenue Code of 1954 (Title 26, United States Code).

Trial was to the court without a jury.

After hearing the testimony of the parties, examining the exhibits, memoranda and the Proposed Findings of Fact and Conclusions of Law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The court has jurisdiction over this action. 28 USC §§ 1340, 1345; 26 USC § 7402(a).
2. Defendant De Berardinis was, at the time of the institution of this action, a resident of the State of Connecticut. (Complaint, ¶4; Answer, ¶2.)

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3. (a) Defendant De Berardinis organized McFaddin on January 14, 1953 in the State of Connecticut. (Tr. 13, 14).¹

(b) This corporation was a common carrier operating in interstate freight covering approximately ten states under a certificate to carry on business issued by the Interstate Commerce Commission ("ICC"). (Tr. 14, 15.) McFaddin filed reports annually and remained in business from the date it was organized through 1958 and into 1959. Defendant, during the years 1953 through 1958, owned practically all of the stock except for two qualifying shares and was president. (Tr. 16.) One Ray Boddy (the bookkeeper) was the treasurer who acted as treasurer and secretary and owned one share of stock. McFaddin's attorney in Washington probably owned one share. Altogether there were three stockholders and three directors. (Tr. 17, 18.)

(c) At the beginning of 1959 McFaddin had terminals in Northburg and New Brunswick, New Jersey; in Manhattan; in Stamford, New Haven, Hartford and Norwich, Connecticut; in Springfield, Boston and Worcester, Massachusetts; and in Providence, Rhode Island. There were eleven in all. The "main" office was in Stamford, Connecticut. The company was authorized to operate in the five northern New Jersey counties, Metropolitan New York, Connecticut and Massachusetts and, part of New Hampshire. (Tr. 21, 22, 23.)

(d) At the beginning of 1959 McFaddin employed 270 persons, owned approximately 190 vehicles and rented

¹ Numbers in parentheses preceded by "Tr." refer to pages in the stenographer's minutes of the trial. Numbers preceded by "Pl. Ex." refer to plaintiff's exhibits; capital letters preceded by "Def. Ex." refer to defendant's exhibits.

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others; some of the vehicles were subject to chattel mortgages (Tr. 23, 27.)

(e) In January 1959, according to defendant, McFaddin had more than 5,000 customers. The gross revenues of McFaddin in January 1959 "approached" \$3,000,000 per year or about \$60,000 a week. (Def. Ex. A; Tr. 30, 31.)

(f) During the years 1953 through 1958 defendant selected the vehicles and all the other new equipment to be purchased by McFaddin. Defendant made the decision of the corporation as to whether a particular item of equipment should be purchased. (Tr. 19, 20.)

4. In 1959 McFaddin experienced financial difficulties. As a result thereof, defendant sought to sell McFaddin to Adley. (Tr. 32.)

5. Defendant De Berardinis, as president of McFaddin, entered into two written contracts with Adley on April 20, 1959. One contract was a management contract which provided that management and control of McFaddin would pass to Adley ". . . from the effective date of any order of the Commission authorizing the same, or to such earlier or later date as shall be ordered by said Commission, and unless otherwise ordered by said Commission until a final order is made by said Commission disposing of the Third Party's application for authority to acquire through ownership of capital stock control of the First Parties." (Def. Ex. A-2, p. 5.) The other contract was a contract of sale which was conditioned upon approval of the ICC of the temporary management of McFaddin by Adley and upon ICC approval of the contract of sale. (Def. Ex. A-2, p. 1; Tr. 42-48.)

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6. Neither agreement made provisions for payment of McFaddin's withholding and FICA taxes for the period April 1, 1959 to May 21, 1959. (Def. Exs. A-1, A-2; Tr. 56, 57.)

7. On or about April 1, 1959 defendant signed his resignations as president and director of McFaddin. On or about the same day defendant signed the stock certificates representing all of his shares in McFaddin, filled in Adley's name and transferred the certificates and resignations to the Fairfield County Trust Company as escrow agent. (Tr. 151-161.)

8. On or about May 7, 1959 Adley filed an application with the ICC to permit a management arrangement with McFaddin. The application also requested approval of the sale of McFaddin to Adley. The sale was never consummated because Adley eventually opposed its own application and the ICC thereupon refused to grant its approval. (Def. Ex. A; Tr. 28, 29, 49, 180.)

9. On May 21, 1959 the ICC entered an order authorizing Adley ". . . to control McFaddin Express, Inc., through management, but for a period not exceeding 180 days, beginning with the date hereof, . . ." (i.e. May 21, 1959). (Def. Ex. B; Tr. 52, 178, 179.)

10. Subsequent to the granting of the order by the ICC, De Berardinis, as president of McFaddin, did on May 25, 1959 suffer a transfer of the assets, management and control of McFaddin to Adley, this being done without *specifically* providing for the deposit, payment or segregation of funds necessary to liquidate McFaddin's withholding and FICA liability which had accrued since April 1, 1959. (Pl. Ex. 6; Tr. 52, 54.)

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11. For the period April 1, 1959 to May 21, 1959, withholding and FICA taxes amounting to \$34,055.59 became due the United States from McFaddin. That amount, here claimed by the government, was not withheld and paid over to the government when due. (Pl. Exs. 5, 9.)

12. (a) On or about September 9, 1959 defendant De Berardinis, as president of McFaddin, signed Internal Revenue Form 7004, which was an application for an extension of time to file McFaddin's corporate income tax return for the fiscal year July 1, 1958 to June 30, 1959. (Pl. Ex. 8.)

(b) On December 8, 1959 defendant De Berardinis, as president of McFaddin, signed Internal Revenue Form 1120, which is the corporate income tax return for McFaddin for the fiscal year July 1, 1958 to June 30, 1959. (Pl. Ex. 7.)

(c) Defendant De Berardinis was a responsible person whose duty it was to collect and pay over the withholding and FICA taxes here involved. Prior to April 1, 1959 and through at least December 8, 1959 he was director, president and principal shareholder of the stock of McFaddin. He continued to have the authority to sign checks for McFaddin after April 1, 1959 until May 25, 1959. He was aware that taxes had to be paid for the period April 1, 1959 to May 21, 1959 and that they were not paid by either himself or by Ray Boddy. (Pl. Exs. 6, 7, 8; Tr. 39, 40, 41, 98, 99, 162, 163.)

13. At the time of the transfer of assets from McFaddin to Adley, said assets had sufficient equity, if liquidated, to pay the amount of withholding and FICA taxes here claimed by the government. (Tr. 137, 138.)

14. Subsequent to the transfer of assets from McFaddin to Adley, the assets, income and business of McFaddin

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rapidly declined. (Tr. 86, 96-98.) McFaddin's gross income for the entire calendar year 1960 was only \$60,854 as compared to gross income of about \$3,000,000 the previous year. (Def. Ex. A, Def. Ex. H (for identification); Tr. 30, 31.)

15. (a) On January 13, 1961 a delegate of the Secretary of the Treasury made an assessment against De Berardinis as a responsible officer of McFaddin for unpaid withholding and FICA taxes for the second quarter of 1959 in the amount of \$34,055.59. This amount represented the unpaid withholding and McFaddin's employees' share of FICA taxes for the period April 1, 1959 through May 21, 1959. (Pl. Exs. 5, 9.)

(b) On August 10, 1961 De Berardinis submitted a form 656 "Offer in Compromise" to the Internal Revenue Service. This offer was rejected on April 27, 1962. (Pl. Ex. 3; Tr. 5, 8.)

(c) On June 7, 1964, De Berardinis submitted a form 656 "Offer in Compromise" to the Internal Revenue Service. This offer was withdrawn on May 12, 1964. (Pl. Ex. 4; Tr. 5, 8.)

(d) Each of the above-mentioned Offers in Compromise contains the following language with respect to the statute of limitations:

"The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter."

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The effect of the two Offers in Compromise was to extend the six-year statutory period of limitations on collection after assessment by three years and twenty-two days. (26 USC § 6502(a)(1); Pl. Exs. 3, 4.)

(e) On January 3, 1970 plaintiff commenced the present action by the filing of a complaint.

16. As a result of certain acts of Adley with respect to the McFaddin assets after Adley took control, defendant started a lawsuit against Adley on behalf of McFaddin and himself individually because he was the chief stockholder. This action resulted in findings by the Superior Court of Connecticut that Adley was responsible for the destruction of McFaddin's business. Adley paid McFaddin \$120,000 in settlement of the action. The sum of \$72,640, representing the net proceeds of the settlement after attorney's fees and expenses, was paid over to the United States government in settlement of its claim against that fund to satisfy delinquent taxes. The United States played no part in the lawsuit brought by McFaddin against Adley. (Def. Exs. T, Y; Tr. 105, 106, 107, 131; Stipulation between counsel, Tr. 195, 196.)

17. The collection of \$72,640 was applied against the tax liabilities of McFaddin as follows:

Withholding and Social Security (FICA)	4th Qtr. of 1957	Interest	\$ 6,359.38
Withholding and Social Security (FICA)	1st Qtr. of 1958	Tax Penalty Interest	\$46,253.95 508.78 19,517.89

(Def. Ex. T, Answer No. 4; Tr. 129.)

18. Plaintiff has not failed to properly apply prior payments.

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DISCUSSION

Section 3101, Internal Revenue Code of 1954, provides that in addition to other taxes there shall be a tax on the wages of employees. This is the Social Security (FICA) Tax. It is further provided in § 3102 that the "tax imposed by section 3101 shall be collected by the employer of the taxpayer [i.e., the employee] by deducting the amount of the tax from the wages as and when paid." Moreover, § 3402 requires the employer paying wages to deduct and withhold from such wages a percentage of the wages as income tax withheld at the source and § 3403 makes the employer liable for the payment of the withheld income tax. With respect to the money so collected, § 7501(a) provides:

"Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

This suit revolves around the provisions of § 6672, which provide:

"Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penal-

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ties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."

Basically, there are two elements composing the liability imposed under § 6672. The "person" must be a "responsible officer" and the attempt to defeat or evade the tax must be "willfull."

This court in *Spivak v. United States*, 254 F. Supp. 517 (S.D.N.Y. 1966), aff'd 370 F. 2d 612 (2d Cir. 1967), cert. den. 387 U.S. 908, adopted

"* * * the definition of 'willful' contained in *Bloom v. United States*, 272 F. 2d 215 (9th Cir. 1959), cert. denied 363 U.S. 803, 80 S.Ct. 1236, 4 L.Ed. 2d 1146 (1960), a case under the predecessor of present Sections 6672 and 6671(b). It was there said:

"* * * In our view there need not be present an intent to defraud or deprive the United States of the taxes collected or withheld for its account, nor need bad motives be present in order to invoke the sanctions of [the predecessor of Section 6672]. The decision of appellant as the responsible officer of the corporation not to have the corporation pay over to the government the withheld taxes was a voluntary, conscious and intentional act to prefer other creditors of the corporation over the United States. In our view such conduct was willful within the meaning of [the predecessor of Section 6672].* * *" *Bloom v. United States*, 272 F. 2d at 223.

This test was approved in this circuit in *Horwitz v. United States*, 339 F. 2d 877 (2nd Cir. 1965), affirm-

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ing per curiam Horwitz v. United States, 236 F.Supp. 812 (S.D.N.Y. 1964). Moreover, this definition of 'willful' comports with the statutory scheme."

Id. at 523.

In Ferguson v. Warren, 13 A.F.T.R. 2d 662 (W.D.Wash. 1963) the court defined the term "responsible officer" as follows:

"For one to be a person responsible for collection or payment of taxes, it is not necessary that he be a general disbursing officer or employee of a corporation. A person responsible for taxes is one who has the power to decide what corporation bills should or should not be paid and when. Stated another way, if a corporation did not have enough money to pay all of its creditors, the person who had the power to decide which creditors to pay and which creditors not to pay is a person responsible for payment of the corporation taxes within the meaning of the law we are dealing with in this case."

Id. at 663.

In Dorsey v. United States, 66-2 U.S.T.C. ¶ 9521 (E.D.N.Y. 1966) the jury was charged as follows:

"The law defines a responsible officer-employee of the corporation as one so connected with the business as to be in a position to exercise full authority with respect to its financial affairs.

"A responsible officer may not relieve himself of his duty by attempting to delegate his responsibility to a non supervisory employee such as a bookkeeper."

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I.

BURDEN OF GOING FORWARD AND BURDEN OF PERSUASION

Upon trial of an assessment under § 6672 the federal courts have regularly held that upon the introduction into evidence of the government's Certificate of Assessment (Pl. Ex. 5) the government has made its *prima facie* case and a rebuttable presumption of liability has arisen. If the taxpayer does not offer evidence to overcome the presumption, the judgment must be entered in favor of the government.

In *United States v. Lease*, 346 F. 2d 696 (2d Cir. 1965), the burdens involved were summarized as follows:

"* * * Thus, overall, the Government has the burden of coming forward and persuading the trier that the taxpayer has or had a tax liability. If not challenged the assessment establishes that liability. A taxpayer's challenge must persuade the trier by a preponderance of the evidence that the assessment is erroneous. The Government then must still persuade the trier that on the basis of all the evidence there was a tax liability—perhaps in a different amount than initially asserted—for which the taxpayer was responsible. * * *"

Id. at 701. See *Reinecke v. Spalding*, 280 U.S. 227 (1932); *United States v. Galtrof*, 245 F. Supp. 158 (S.D.N.Y. 1965); *Psaty v. United States*, 442 F. 2d 1154, 1159 (3rd Cir. 1971); *United States v. Rexach*, 482 F. 2d 10 (1st Cir. 1973), cert. denied 414 U.S. 1039 (1973). This presumption of correctness attaches to each element. *Datlof v. United States*, 252 F. Supp. 11, 32 (E.D. Pa. 1966), aff'd 370 F. 2d 655 (3rd Cir. 1966), cert. denied 387 U.S. 906.

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II.

DEFENDANT FAILED TO MEET HIS DUAL BURDEN

A. *Responsible Officer*

Plaintiff has assessed against defendant a "responsible officer" penalty. (Pl. Exs. 5, 9.) As is set forth above, the burden was upon the taxpayer-defendant to present evidence showing that the assessment was improper. Such evidence must be credible in order to sustain that burden. The basic evidence introduced by defendant was his own self-serving and uncorroborated testimony. The primary theory of his defense is that he was not in control of McFaddin during the second quarter; however, a letter, written on December 19, 1961 (Pl. Ex. 6) indicates otherwise. It should be noted that it was only for the period April 1, 1959 through May 21, 1959 that an assessment was made against defendant. The obligation of a responsible officer arises at the time the taxes are withheld from wages, *not* at some subsequent time when payment is due or the return is to be filed. 26 USC § 7501; Long v. Bacon, 239 F. Supp. 911 (S.D.Iowa 1965). Even if Adley were also in control of McFaddin beginning on April 1, 1959, defendant has not established that Adley was the *sole* responsible officer.

In addition to the letter (Pl. Ex. 6), other contradictions appear in the taxpayer's testimony. He testified that he was not the president of McFaddin and that he signed no corporate papers in his capacity as a corporate officer after April 1, 1959 (Tr. 48, 59); yet plaintiff produced an income tax return and a request for an extension of time to file that return signed in December and September 1959, respectively. (Pl. Exs. 7, 8.) De Berardinis testified that he just did as he was told when he signed the return without grasping the significance of his act (Tr. 186-188); yet the

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execution of that document was under the pains and penalties of perjury.

Defendant testified that he had authority to sign checks for McFaddin although he had a great deal of difficulty recalling *what* he had signed. (Tr. 40.) He also testified that one Ray Boddy had served as treasurer of McFaddin, yet Boddy was never produced. No witnesses were introduced to buttress his claim that Adley had taken control as of April 1, 1959.

Defendant's Exhibits A, A-1, A-2 and B establish the fact that Adley was at least entitled to control after May 21, 1959; however, that period is not an issue in this case. Defendant's Exhibits C, D, E, F and G do not deal with matters at issue in this case and therefore add nothing which can be of assistance in reaching a decision.

B. Willfulness

Clearly, defendant's acts were willful. In dealing with the issue of willfulness, the courts have repeatedly held that if a corporation had sufficient assets with which to pay the employment taxes due, and the taxpayer as a responsible officer made a deliberate choice to pay other creditors, instead of paying the government, the conduct involved was "willful" within the meaning of the Internal Revenue Code. See *Dillard v. Patterson*, 326 F. 2d 302 (5th Cir. 1963); *Bloom v. United States*, 272 F. 2d 215 (9th Cir. 1959).

Numerous cases have dealt with the liability of a responsible officer who pays other creditors when the withholding and social security taxes remain unpaid or where funds are used to pay current operating expenses prior to liquidating the accrued tax liability. See *United States v. Graham*, 66-2 U.S.T.C. ¶ 9703, 18 A.F.T.R. 2d 6009 (E.D.N.Y. 1966); *Burden v. United States*, 72-2 U.S.T.C.

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¶ 9597, 30 A.F.T.R. 2d 72-5292 (N.D. Okla. 1972), aff'd 486 F. 2d 302 (9th Cir. 1973).

The withholding tax trust fund must not be subjected to common business risks. Frequent consultation by the responsible officer with the Internal Revenue Service is no defense to the liability. *Carroll v. United States*, 67-2 U.S.T.C. ¶ 9656, 20 A.F.T.R. 2d 5560 (S.D.N.Y. 1967).

Under the facts of this case the court is presented with a situation where defendant's corporation incurred liability for unpaid withholding and FICA taxes between April 1 and May 21, 1959. During that time, De Berardinis permitted and, in fact, joined in the voluntary transfer of control and possession of all of the assets of McFaddin without providing for the payment of the tax liability which had accrued during the first fifty one days of that quarter. By this act, De Berardinis sought to contract away not his future tax liabilities but McFaddin's accrued liability.

III.

DEFENDANT HAS FAILED TO PRESENT ANY SUBSTANTIAL AND LEGALLY COGNIZABLE DEFENSE

Defendant has raised certain defenses, but they are without substance.

A. Timeliness of Filing Complaint

Defendant has denied plaintiff's allegation that the complaint, filed on January 23, 1970, was timely filed. (Complaint, Par. 9; Answer, Par. 3.) The assessment was made on January 13, 1961. Section 6502(a)(1), Internal Revenue Code of 1954, provides:

"Where the assessment of any tax imposed by this title has been made within the period of limitation

*Trial Court's Opinion, Findings of Facts and
Conclusions of Law.*

properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

“(1) within 6 years after the assessment of the tax, * * *.”

The statutory period would have expired on January 13, 1967. However, § 6502(a)(2) provides that the tax may be collected only if the levy is made or the proceeding begun

“prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under Section 6343 after such 6-year period, then before such release).”

In the present case extensions were made. Evidence of such extensions was submitted. (Finding of Fact 13; Pl. Exs. 3, 4.) The first offer was submitted on August 10, 1961 and was rejected on April 27, 1962, thus extending the statutory period for eight months and seventeen days, plus one year. The second offer was submitted on January 7, 1964 and withdrawn on May 12, 1964, extending the period for four months and five days plus one year. The combined extension is therefore two years, twelve months and twenty-two days, or three years and twenty-two days causing the period to expire on February 4, 1970, several weeks subsequent to the filing of the complaint.

B. Plaintiff's Failure to Properly Apply prior Payments

The defendant claims that the United States has failed to apply funds received by it in such a way as to relieve him of the responsible officer assessment against him. This charge is not denied, in fact for the Commission of Internal

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Revenue to have done otherwise would have been to shirk his responsibility to insure that the maximum amount of assessed tax be collected. *Monday v. United States*, 421 F.2d 1210 (7th Cir.), cert. denied 400 U.S. 821 (1970).

Defendant attempts to buttress his defense with Revenue Rulings 73-304 and 73-305, I.R.B. 1973-29, 7/16/73. The scope of these rulings is limited to voluntary payments by a taxpayer to the Internal Revenue Service prior to the commencement of litigation. All payments received by the United States were involuntary in that they resulted from Internal Revenue levies or participation in litigation. The \$72,640 received in the settlement of the Adley litigation was received from McFaddin and not from defendant and was properly applied to that corporation's outstanding and singular liability. *Burch v. United States*, 71-1 U.S.T.C. ¶ 9366, 27 A.F.T.R. 2d 71-1291 (D. Col. 1971); *Carroll v. United States*, *supra*; *Datlof v. United States*, 370 F. 2d 655 (3rd Cir. 1966); *Hewitt v. United States*, 377 F. 2d 921 (5th Cir. 1967).

C. The Duty of the United States to Act as a Collection Agent for McFaddin and Defendant

Defendant's third and final defense is the alleged failure of the United States to enforce its tax liens on McFaddin's assets.

Defendant contends that when a third party takes over control and has assets with tax liens on them and misappropriates the assets and the IRS is informed of that, the IRS has some obligation to do something about it and that it should enforce its liens, if that is the only course available, against the assets in the hands of the third party. (Tr. 105, 106.)

Defendant claimed that he informed the IRS of his sale of McFaddin to Adley during a meeting with IRS agents

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in the Stamford IRS office some time in mid-May 1959. At the same time, defendant claims, he informed the IRS that Adley was going to pay McFaddin's delinquent taxes. (Tr. 122, 123, 125, 126.)

Defendant further claimed that he made a request to IRS in August 1959 with respect to Adley's handling of McFaddin's assets. (Tr. 133.) Defendant testified that he asked the IRS to make the books and records available to him and he could show where the assets were and how much in dollars was involved. These books had been turned over to Adley. The point, according to defendant, was that "if they were able to get the books * * * we could show them where the assets were." (Tr. 135, 136.) The trial court stated: "This is getting back to the theory that if the Company had some assets, why the Government needn't worry. In other words, he was trying—Counselor, if I may say this, he was trying to treat IRS like some businessman would treat a creditor, not under the required payment regulation." (Tr. 136.) Defendant further stated that he told the IRS to seize the assets which McFaddin had had and the equipment which had been turned over to Adley so that the assets could be converted into cash to pay the obligation of McFaddin. (Tr. 136, 137.) Defendant relies on *Tozier v. United States*, 65-2 U.S.T.C. ¶ 9621 (W.D.Wash. 1965). The facts in *Tozier* are immediately distinguishable from the present action. The court, at page 96,645, Finding XXV, found that there was an agreement with the revenue agent to attempt to limit the effect of the responsible officer penalty. That agreement provided, in substance, that in order to continue the operation of the corporation as long as possible the IRS would forego levy and seizure of the corporate assets if the responsible officers would refrain from liquidation proceedings. The corporation in *Tozier* was the largest single employer in a

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Washington county and its closing would have resulted in increased unemployment and loss of revenue to the United States. The responsible officers had threatened to liquidate in order to protect themselves from the 100 per cent penalty for non-payment of payroll taxes. If levy, seizure and sale eventually became necessary, then, pursuant to said agreement, the IRS was to apply the proceeds thereof first to the payment of those employment taxes which might result in imposition of the 100 per cent penalty. This agreement was subsequently breached by the IRS when it applied the proceeds of the sale of assets to *employer* taxes and when it released some of the seized assets. In Tozier the court held that because of the agreement and breach thereof, the withholding and FICA tax deficiencies resulted not from the "willful" conduct of the responsible officers but from the conduct of the IRS. In the present action, no such agreement has been either proved or pleaded by defendant and his reliance on Tozier is misplaced. This defense that the IRS has a duty to act as a collection agent for defendant is without merit.

The courts have universally held that the United States is not bound by laches. *United States v. Firestone Tire & Rubber*, 374 F. Supp. 431 (N.D. Ohio 1974); *United States v. Pensalt Chemicals*, 262 F. Supp. 101 (E.D. Pa. 1967); *Woods v. Wayne*, 177 F. 2d 559 (4th Cir. 1949); *United States v. Sandlass*, 34 F. Supp. 81 (D. N.J. 1940). The doctrine of laches is especially inappropriate in the area of tax collection since "[t]axes are the lifeblood of the Government and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935).

It is, therefore, evident from the above discussion that defendant failed to show by credible evidence that he was not a responsible officer of McFaddin during the April 1

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Conclusions of Law.*

through May 21, 1959 period for which the tax imposed by § 6672 has been assessed against him. Moreover, defendant has been unable to sustain any of his claimed defenses with meaningful and recognized legal authority and, in fact, the recognized precedents are contrary to his position.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this action. 28 USC §§ 1340, 1345; 26 USC § 7402(a).
2. Pursuant to 26 USC §§ 6201(a) and 6672, an assessment in the amount of \$34,055.59 was made against De Berardinis as a responsible officer of McFaddin on January 13, 1961.
3. This action was commenced within the period of limitations permitted by statute. 26 USC § 6502(a).
4. Defendant willfully failed to collect and pay over a total of \$34,055.59 in withholding and FICA taxes due for the period April 1, 1959 to May 21, 1959, when it was his duty to so collect and pay over such taxes. 26 USC §§ 6672, 6671(b).
5. Plaintiff was under no obligation imposed by statute, administrative regulation or agreement to make any particular application of payments received due to its collection activities with respect to the liabilities of McFaddin.
6. Plaintiff was under no obligation imposed by statute, administrative regulation or agreement to take any particular collection activity with respect to the liabilities of McFaddin.

Judgment of Trial Court.

7. Plaintiff, United States of America, is entitled to judgment against defendant, Louis D. De Berardinis, Jr., for taxes assessed in the sum of \$34,055.59, plus interest according to law and costs.

Settle judgment promptly in Bridgeport upon notice pursuant hereto.

Dated: May 29, 1975.

(Sgd) RICHARD H. LEVET
United States District Judge,
Sitting by Designation.

(Seal)

Judgment of Trial Court.

The above entitled action came on for trial before the Court sitting without jury at Bridgeport on February 3, 1975. Upon the Complaint of the plaintiff, United States of America, and based upon the Opinion, Findings of Fact and Conclusions of Law of this Court, filed herein on May 30, 1975, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff, United States of America shall have final judgment against the defendant, Louis D. DeBerardinis, Jr., pursuant to Section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. § 6672, as a responsible officer of McFaddin Express, Inc. for his willful failure to collect and to pay over to the United States of America the sum of \$34,055.59 in withholding and Federal Insurance Contributions Act taxes for the period April 1, 1959 through May 21, 1959 and interest on the above sum in the amount of \$29,830.82 computed at

Judgment of Trial Court.

6% for the period January 13, 1961 through June 30, 1975 and at 9% for the period July 1, 1975 through July 31, 1975 pursuant to 26 U.S.C. § 6601, as amended, in the total amount of \$63,886.41 and that interest shall accrue on this judgment as provided by law after its entry, and it is further

ORDERED, ADJUDGED AND DECREED that said final judgment against defendant Louis D. DeBerardinis shall be entered on July 31, 1975.

Dated at Bridgeport, Connecticut, this 31st day of July, 1975.

SYLVESTER A. MARKOWSKI, Clerk

By VINCENT R. DEROSA
Vincent R. DeRosa
Deputy in Charge

APPROVED:

RICHARD H. LEVET
Richard H. Levet
Senior United States District Judge
Sitting by Designation

Paragraph 7 of Complaint.

* * * *

7. That on January 13, 1961, a delegate of the Secretary of the Treasury of the United States of America made 100% penalty assessments against the defendant for willful failure to collect, truthfully account for, and pay over federal withholding and FICA taxes pursuant to Sections 6671 and 6672 of the Internal Revenue Code of 1954 as follows:

<i>First Quarter 1958</i>	<i>Second Quarter 1959</i>
\$39,680.73	\$34,055.59

* * * *

Questions and Answers in Paragraphs 5 and 6 of Plaintiff's Answer to Defendant's Interrogatories (Ex. T).

* * * *

Q. 5. With respect to each tax referred to in question no. 1 above, and with respect to each interest and penalty charge referred to in question no. 2 above, show the ones for which the United States has claimed defendant De-Berardinis was liable under the 100% penalty assessments against him.

A. 5. As set forth in paragraph 7 of the complaint, the trust fund portions of withholding and Social Security taxes for the first quarter of 1958 and the second quarter of 1959 were assessed, as one hundred percent penalties, against the defendant, in the amounts of \$39,680.73 and \$34,055.59, respectively.

Q. 6. As to each collection obtained by the United States for application against tax, interest and/or penalty of

*Questions and Answers in Paragraphs 5 and 6 of
Plaintiff's Answer to Defendant's
Interrogatories (Ex. T).*

McFaddin, show how and the extent to which the United States applied each such collection against each penalty assessment asserted by the United States against defendant DeBerardinis; and set forth the tax, interest and/or penalty of McFaddin to which that penalty assessment relates.

A. 6. After application of the collections set forth above, McFaddin remains liable for the following: (1) the full amount of the assessment of withholding and Social Security tax, with interest, for the second quarter of 1959, in the amount of \$55,546.09, plus accrued unassessed interest. (2) Accrued unassessed interest on withholding and Social Security tax for the first quarter of 1958. All other accounts set forth in the answer to 1 above have been paid in full. Since the withholding and Social Security tax for the first quarter of 1958 have been paid, the defendant is no longer liable for the one hundred percent penalty for that tax. However, the defendant remains liable for the one hundred percent penalty for withholding and Social Security tax for the second quarter of 1959, in the amount of \$34,055.59, plus accrued interest.

* * * *

**Questions and Answers in Paragraphs 1, 5 and 6 of
Plaintiff's Answer to Defendant's Interrogatories
(Ex. U).**

* * * *

1. Referring to plaintiff's answer to question 1, appearing in plaintiff's "Answers to Interrogatories" dated March 4, 1974, set forth with respect to each tax appearing in said answer 1, the date on which said tax became a lien against the assets of McFaddin Express, Inc.

Answer: Each tax became a lien on the date of assessment, as follows:

<i>Tax</i>	<i>Period</i>	<i>Date</i>
Withholding and Social Security	4th Qtr. of 1957	2-14-58
Withholding and Social Security	1st Qtr. of 1958	5- 6-58
Withholding and Social Security	2nd Qtr. of 1959	2-28-59
Unemployment	1959	3- 4-60
Excise	4th Qtr. of 1957	2-28-58
Excise	2nd Qtr. of 1960	9- 2-60

* * * *

5. Referring to plaintiff's answer 6, appearing in said "Answers to Interrogatories," explain why the amount of \$55,546.09 is stated in said answer 6 as owing by McFaddin Express, Inc. for the second quarter of 1959, whereas \$34,055.59 is the amount claimed in said answer 6 to be due from defendant DeBerardinis for the quarter. What accounts for the difference between these amounts?

Answer: The assessment against McFaddin was for both the trust fund portion of the taxes (the amount withheld

Questions and Answers in Paragraphs 1, 5 and 6 of Plaintiff's Answers to Defendant's Interrogatories (Ex. U).

from the wages of employees) and the employer's portion of the taxes, plus interest. The assessment against Mr. DeBerardinis of a one hundred percent penalty was only for the trust fund portion of the taxes. Therefore, the assessment against Mr. DeBerardinis was less than that against McFaddin.

6. Does plaintiff claim that defendant DeBerardinis owes herein any more than \$34,055.59 plus accrued interest on this amount from Jan. 31, 1961?

Answer: No.

* * * *

**Extracts from Ex. A, ICC Application Page 2,
Statement of Equipment.**

**Application For Authority Under Section 5, Interstate
Commerce Act—Continued**

III. That the number of motor vehicles owned, leased, controlled, or normally operated by applicant (if a motor carrier), the motor carrier(s) of which control is proposed to be acquired, and affiliates² of both, during the 6-month period immediately preceding the filing of this application, was:

	<i>McFaddin Motor Carrier</i>	<i>L & L Truck Leasing Corp.</i>
<i>Adley Applicant</i>	<i>Proposed to be controlled</i>	
Buses
Trucks	290	21
Tractors	288	60
Semitrailers	563	100
Service Cars	23	3
Wreckers	3	...
Passenger Cars	48	7
	<hr/>	<hr/>
Total ³	1215	191
		52

IV. That there are set forth in exhibits attached hereto and made a part hereof, the following:

Exhibit A—Information respecting applicant, its affiliates if any, and the person or persons controlling applicant;

Exhibit B—Information respecting carrier to be controlled, and its affiliates, if any, engaged in an activity connected with transportation, of which control would be acquired in this transaction;

*Extracts from Ex. A, ICC Application Page 2,
Statement of Equipment.*

Exhibit C—Nature of proposed transaction and terms and conditions thereof; and

Exhibit D—Facts and circumstances on which applicant relies to warrant approval of the proposed transaction; and applicant will submit such additional information as the Commission may require.

V. That the person to whom correspondence with respect to this application should be addressed is as follows:

Richard H. Simons Exec. Vice Pres. & Gen. Counsel The Adley Express Co. 216 Crown Street New Haven, Conn.	Jack R. Turney, Jr. Turney & Turney 2001 Massachusetts Avenue, N. W. Washington, D. C. Attorney For Applicant
--------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------

S. Harrison Kahn
1110 Investment Building
Washington 5, D. C.
Attorney For Seller

Balance Sheet of McFaddin at December 31, 1958.

Summary of McFaddin Express & L. & L. Leasing Corp.
as at December 31, 1958

Assets	McFaddin	L & L	Total
<i>Current Assets</i>			
Working Funds	2,280.00	54.97	2,334.97
Special Deposits	19,983.48	—	19,983.48
Accounts Receivable—Customers	51,693.54	60.00	51,753.54
Accounts Receivable—Interline	37,102.78		37,102.78
Accounts Receivable—Others	3,265.99		3,265.99
Accounts Receivable—Employees	40,345.11		40,345.11
Total Accounts Receivable	132,407.42	60.00	132,467.42
Deferred Interest		16,190.90	16,190.90
Deferred Taxes		465.00	465.00
Prepaid Expenses	132,026.56		132,026.56
Materials and Supplies	36,713.54		36,713.54
Total Deferred, Prepaid Supplies	168,740.10	16,655.90	185,396.00
Less Reserve for Uncollectible	(18,920.68)		(18,920.68)
Total Current Assets	304,490.32	16,770.87	321,261.19
<i>Fixed Assets</i>			
Revenue Equipment	997,073.43		
Service Equipment	18,448.75		
Shop and Garage Equipment	13,422.91		
Furniture & Fixtures	28,559.03		
Miscellaneous Equipment	32,073.04		
Improvements to Leasehold	20,068.06		
L & L Leasing Corp. Equipment		212,298.11	1,321,943.33
Less Depreciation Reserve	528,456.78	121,092.95	649,549.73
Total Fixed Assets	581,188.44	91,205.16	672,393.60
<i>Intangible Assets</i>			
Franchise	39,625.00		
Organization Expense	222.00		
Subscriptions Receivables		2,000.00	41,847.00
Total Assets	925,525.76	109,976.03	1,035,501.79

Balance Sheet of McFaddin at December 31, 1958.

Liability	McFaddin	L & L	Total
<i>Current Liability</i>			
Notes Payable	31,360.45		31,360.45
Accounts Payable Affil. Co.	8,191.95	16,987.53	25,179.48
Accounts Payable—Interline	49,688.07		49,688.07
Accounts Payable—Creditors	108,812.60	212.19	109,024.79
Withholding and S.S. Taxes	24,318.70		24,318.70
 Total Accounts Payable	222,371.77	17,199.72	239,571.49
Accrued Payroll	33,116.04		33,116.04
C.O.D.s Unremitted	401.81		401.81
Accrued Taxes	18,221.78	356.93	18,578.71
Accrued Insurance	9,297.98		9,297.98
 Total Current Liabilities	283,409.38	17,556.65	300,966.03
<i>Long Term Obligations</i>			
Equipment Obligations	574,311.63	100,516.11	674,827.74
Other Advances Payable	260,859.35	—	260,859.35
 Total Long Term Obligations	835,170.98	100,516.11	935,687.09
Reserve for Injury, Loss and Dam- age	15,337.01		15,337.01
Deferred Credits	13,775.18		13,775.18
 Total Liabilities	1,147,692.55	118,072.76	1,265,765.31
<i>Capital</i>			
Capital Stock	149,554.99	2,000.00	151,554.99
Earned Surplus (Deficit)	(371,721.78)	(10,096.73)	(381,818.51)
 Total Capital	(222,166.79)	(8,096.73)	(230,263.52)
 Total Liabilities	925,525.76	109,976.03	1,035,501.79

Ex. D, Expected Profit by Adley.

Estimated Savings In Operating Expenses For Year, 1958,
Through Proposed Management

	<i>McFaddin Actual for year, 1958</i>	<i>Projected Cash Expenses for yr. 1958, giving effect to Control</i>	<i>Projected Cash Savings under Control</i>
<i>Revenues</i>	\$2,188,000		
<i>Expenses</i>			
<i>Equipment Maintenance (4100)</i>			
4110 Supervision	\$ 16,227.46	\$ 16,000	
4120 Office and other expense	1,044.69	1,000	
4130 Repairs and service—equipment parts	49,339.65	59,000	(10,000)
Repairs and service—equipment labor	76,006.70	76,000	—
4160 Tires and Tubes—Revenue equip- ment	73,317.49	43,000	30,000
4180 Other	1,741.62	3,000	(1,000)
<i>Total</i>	<u>\$ 217,677.61</u>	<u>\$ 181,000</u>	<u>\$ 36,000</u>
<i>Transportation Expenses (4200)</i>			
4210 Supervision	\$ 75,720.17	\$ 76,000	
4220 Office and other expense	1,635.10	1,000	1,000
4230 Drivers and Helpers	761,323.28	654,000	107,000
4245 Employees Health and Welfare	28,882.83	25,000	3,000
4250 Fuel for revenue equipment	87,973.70	65,000	22,000
4260 Oil for revenue equipment	6,413.97	2,000	5,000
4270 Purchased transportation	116,013.49	48,000	68,000
4280 Other transportation expenses	69,820.82	76,000	(6,000)
	<u>\$1,147,783.36</u>	<u>\$ 871,000</u>	<u>\$276,000</u>

Ex. D, Expected Profit by Adley.

	<i>McFaddin Actual for year, 1958</i>	<i>Projected Cash Expenses for yr. 1958, giving effect to Control</i>	<i>Projected Cash Savings under Control</i>
<i>Terminal Expenses (4300)</i>			
4311 Supervision salaries	\$ 7,101.69	\$	\$ 7,000
4312 Salaries and Fees—Billing and Collecting	49,717.20	80,000	(31,000)
4320 Office and other expense	15,433.19	9,000	7,000
4340 Salaries and wages—Platform employees	112,486.02	160,000	(47,000)
4345 Employees welfare expense	4,960.10	10,000	(5,000)
4350 Other Terminal employees	20,767.52	—	21,000
4360 Commission agents	1,219.90	—	1,000
4385 Operating rents	64,855.00	—	65,000
4380 Other Terminal expenses	12,212.93	—	12,000
	<hr/>	<hr/>	<hr/>
	\$ 288,753.55	\$ 259,000	\$ 30,000
<i>Traffic (4400)</i>			
4410 Supervision—salaries	\$ 98,998.72	\$ 33,000	\$ 66,000
4420 Office and other expense	28,538.37	7,000	22,000
4430 Tariffs and schedules	6,151.04	—	6,000
4450 Advertising	1,154.72	—	1,000
	<hr/>	<hr/>	<hr/>
	\$ 134,842.85	\$ 40,000	\$ 95,000
<i>Insurance and Safety (4500)</i>			
4530 P.L. & P.D. Insurance	\$ 46,661.25	\$ 32,000	\$ 14,000
4540 Workers Compensation	34,204.95	24,000	10,000
4550 Cargo loss and damage	24,622.13	17,000	7,000
4560 Fire, Theft and Collision	1,264.77	4,000	(3,000)
4570 Other Insurance expense	2,412.49	12,000	(8,000)
	<hr/>	<hr/>	<hr/>
	\$ 109,165.59	\$ 89,000	\$ 20,000

Ex. D, Expected Profit by Adley.

	<i>McFaddin Actual for year, 1958</i>	<i>Projected Cash Expenses for yr. 1958, giving effect to Control</i>	<i>Projected Cash Savings under Control</i>
<i>Administrative and General (4600)</i>			
4611 Salaries—general offices	\$ 16,645.70	\$ 43,000	\$ 17,000
4612 Salaries—revenue accounting	33,301.50		(10,000)
4613 Salaries—other general office employees	18,447.22	22,000	(2,000)
4622 Expenses—General office employees	5,336.48	—	5,000
4630 Legal expenses	12,138.71	12,000	—
4635 Auditing expense	7,788.82	2,000	6,000
4640 Communication service	3,303.77	2,000	1,000
4645 Employee welfare expense	53,276.77	10,000	43,000
4660 Uncollectible revenue	309.90	1,000	(1,000)
4680 Other general expenses	16,996.30	2,000	15,000
	92.36	—	—
	\$ 167,637.53	\$ 94,000	\$ 74,000
TOTAL OPERATION MAINTENANCE	\$2,065,860.49	\$1,534,000	\$531,000
<i>Operating Taxes and Licenses (5200)</i>			
Gasoline and other fuel oil taxes	\$ 59,831.52	\$ 45,000	\$ 15,000
Vehicle licenses and registration fees	30,214.66	25,000	5,000
Real Estate and personal property taxes	15,234.42	13,000	2,000
Social Security Taxes	35,044.47	33,000	2,000
Other Taxes	4,515.85	2,000	3,000
	\$ 144,840.92	\$ 118,000	\$ 27,000
Other Deductions			
7500 Miscellaneous	\$ 2,532.42	\$ —	\$ 3,000
7100 Interest	36,983.71	20,000	17,000
	\$ 39,516.13	\$ 20,000	\$ 20,000
TOTAL CASH EXPENSES	\$2,250,217.54	\$1,672,000	\$578,000
Projected Cash Revenue		\$2,188,000	
Projected Cash Expenses		1,672,000	
Projected Cash Profit	\$ 516,000		

Ex. A-1, Sale Contract.

New Haven, Connecticut

THIS CONTRACT made as of this 20th day of April, 1959, between LOUIS DEBERADINIS, JR., herein called the Seller, First Party, and THE ADLEY EXPRESS COMPANY, herein called Purchaser, Second Party,

W I T N E S S E T H :

1. The Parties mutually covenant and agree that this Contract will become effective if and only upon the happening of each of the following events:

1.1 That the Interstate Commerce Commission has approved and authorized temporary operation of the motor carrier business and property of the Seller upon the terms and conditions of a management contract described in Section 4 hereof and attached hereto as Schedule B, *and*

1.2 That said Commission has, by final order, either (a) approved and authorized the execution and consummation of this Contract unconditionally or with conditions satisfactory to the Purchaser, or (b) has failed, refused, or declined to authorize said execution and consummation, and within ninety (90) days thereafter the Second Party upon written notice to First Parties shall have executed and delivered an assignment of this Contract to an assignee ready, willing and able to adopt and consummate the same without the necessity for any governmental approval or authorization.

2. In consideration of the covenants of the Purchaser, the Seller covenants that, subject to and after requisite

Ex. A-1, Sale of Contract.

governmental authorization, he will:

2.1 Upon Consummation Date, bargain, sell, assign, transfer and deliver or cause to be bargained, sold, assigned, transferred and delivered to Purchaser all of the issued and outstanding capital stock of every class of McFADDIN EXPRESS, INC., a corporation organized under the statute laws of the State of Connecticut, with its principal office at Stamford, Connecticut, and L & L LEASING CORPORATION, a Connecticut corporation also with offices at Stamford, Connecticut, free and clear of all claims, liens, charges or encumbrances;

2.2 Represent, warrant and defend that the annexed Schedule A is a true, correct and complete consolidated statement of the assets and liabilities of the aforesaid corporations as of December 31, 1958, and that the assets shown in such Schedule A are free and clear of all claims, liens, charges, encumbrances or demands whatsoever by any and all persons, governments or municipalities except as the same may be specifically listed in the books of the company reflected on Schedule A whether such claims or demands be known or unknown to the Seller;

2.3 Join with Purchaser in any and all applications, petitions or procedures to State or Federal Regulatory Authority for authorization of this transaction, including temporary control and operation of said corporations by Purchaser, and make or furnish all information, accounts, statistics, notices or instruments or further assurance incident to said approval or authorization.

3. In consideration of the covenants of the Seller, Purchaser covenants and agrees, on Consummation Date, to

Ex. A-1, Sale of Contract.

purchase the aforesaid shares of stock and pay therefor in cash the sum of One Hundred and Twenty-Five Thousand Dollars (\$125,000.00), which the Parties agree is the value of the intangible rights, certificates, permits operating authority and business of said corporations over and above the value of the tangible operating property which the Parties have agreed is equal in amount to the amount of the liabilities recorded on said balance sheet; *provided*, however, that the aforesaid purchase price shall be reduced by the amount of any decrease in net worth of said companies as shown on said Schedule A, and the amount of net worth as shall be determined by an audited balance sheet as of December 31, 1958, prepared and certified by Kircaldie, Randal & McNab of New Haven, Connecticut, Certified Public Accountants; *provided*, however, that said purchase price shall be further reduced by any reduction in net worth accruing between December 31, 1958 and the date when Purchaser assumes management of said companies under the aforesaid management contract arising because of the sale or disposition of assets or property or issuance of securities or assumption of any obligation except in the usual and ordinary course of business, as said reduction in net worth shall be determined by said Certified Public Accountants.

As used herein, "Net Worth" means the sum of Accounts Nos. 2700 through 2730, inclusive, plus Accounts Nos. 2900 through 2948 inclusive, of the Commission's Uniform System of Accounts for Class I Common Motor Carriers of Property.

As a further consideration for the transfer of said shares, the Purchaser covenants and agrees to indemnify and hold harmless the employees of MCFADDIN EXPRESS, INC. against any liability for accounts receivable from such employees as shown on said Schedule A.

Ex. A-1, Sale of Contract.

4. That Purchaser shall fix a day, herein called Consummation Date, within thirty (30) days after the said Commission, by Final Order, has authorized this transaction, and the consummation of this contract unconditionally or with conditions acceptable to the Purchaser, and if the Purchaser shall fail to fix said Consummation Date within said thirty (30) days, then the Seller, by written notice to all Parties, may fix said Consummation Date.

5. "Final Order" as used herein means an order of said Commission authorizing, or refusing or failing to authorize this transaction, with respect to which the time for the filing of petitions for reconsideration or rehearing under the rules of the Commission shall have expired, and with respect to which no such petition nor any proceeding for judicial review of said order is pending or to the knowledge of Purchaser or its counsel is proposed or threatened.

6. The term of this Contract shall be from the date hereof to Consummation Date if the transaction be authorized by final order of said Commission, or to a date ninety (90) days after any final order of said Commission refusing, failing or declining to authorize the same. During said period of ninety (90) days, the Purchaser shall have the right to assign this Contract to an assignee ready and willing to adopt and consummate the same, in which event the consummation of the Contract pursuant to such assignment shall be fixed by such assignee for a date within thirty (30) days after such assignment and, if he fails to fix the date within said period of thirty (30) days, then this Contract shall terminate.

This contract is binding upon the heirs, successors and assigns of the parties hereto.

IN TESTIMONY WHEREOF, the Parties have hereunto set their hands and seals on the day and year first above

Ex. A-1, Sale of Contract.

written, and have caused the same to be attested by their respective secretaries and under their respective corporate seals.

LOUIS DEBERADINIS, JR.

s/ Louis DeBerardinis, Jr.
First Party

(SEAL)

THE ADLEY EXPRESS COMPANY

ATTEST:

s/ Ralph J. Adley
Secretary

By s/ M. L. Adley
Second Party

Ex. A-2, Management Contract.

New Haven, Connecticut

CONTRACT, made as of this 20th day of April 1959 between McFADDIN EXPRESS, INC., herein called McFADDIN, and L & L TRUCK LEASING CORPORATION, herein called L & L jointly and severally, First Parties; LOUIS DeBERADINIS, Jr., acting herein for McFADDIN and HENRY DeBERADINIS, acting herein for L & L herein called the STOCKHOLDER, jointly and severally, Second Parties, and THE ADLEY EXPRESS COMPANY, herein called ADLEY, Third Party.

WITNESSETH:

WHEREAS, by an Agreement of Purchase and Sale of even date herewith, LOUIS DeBERADINIS, Jr., subject to and after the authorization of requisite governmental authority, has agreed that he will assign, sell and deliver to the Third Party all of the issued and outstanding capital stock of the First Parties; and

WHEREAS, because of decline in revenues, McFADDIN is now being operated at substantial losses and is unable to pay and discharge its respective obligations as they mature in the ordinary course of business and is unable to secure the necessary capital because of such conditions; and

WHEREAS, the Third Party is ready, willing and able temporarily to manage and operate the properties of McFADDIN if, as and when authorized by the Interstate Commerce Commission, herein called the Commission, and to provide the necessary capital, equipment, terminals and other facilities necessary to preserve McFADDIN as a going concern and assure its future usefulness in the per-

Ex. A-2, Management Contract.

formance of adequate and continuous service to the public; and

WHEREAS, the Third Party is ready, willing and able temporarily to manage and control the business of L & L Truck Leasing Corporation during the term of this contract;

Now, THEREFORE, this Indenture witnesseth:

The parties, each in consideration of the covenants and the agreements of the other, mutually covenant and agree that, subject to the authorization of requisite governmental authority and to all provisions of law and regulations of competent authority, that:

1. The entire business, affairs, property, tangible and intangible, real, personal and mixed, wherever situate, of the First Parties and each of them shall be administered, conducted and operated during the term hereof by and under the complete, exclusive and plenary control, management and direction of the Third Party, subject only to the following specific conditions, limitations or restrictions.

1.1 The Third Party may hire, discipline, discharge officers, agents and employees of the First Parties; fix, determine and cause to be filed and published all tariffs, classifications, freight rates, charges, rules and regulations, including the establishment and maintenance of joint through routes, rates, charges, rules and regulations applicable thereto between McFADDIN and any other carrier, including but not exclusively, the Third Party; collect all revenues and income accruing during, from or arising out of any operations or business transacted for or conducted or operated on account of the business or

Ex. A-2, Management Contract.

property of the First Parties; purchase, sell, lease or otherwise acquire or dispose of materials, supplies, fuel, machines, machinery, tools or appliances required for the efficient, economical and serviceable operation of First Parties, or either of them, in the ordinary course of business, but no contract for the purchase, lease, acquisition or construction of terminals, including within such term land, building and equipment, or of any other property except revenue equipment, or for incurring or assuming any obligation except for the acquisition of equipment, which obligation extends beyond the term hereof where the amount of such acquisition, purchase, lease, construction, sale, disposition or such obligation is in excess of \$25,000 shall be made without the written consent of Second Parties.

1.2 All contracts, agreements or leases between the First Parties, or either of them, and the Third Party shall be in writing and limited to the term hereof. Any such contract for the common or joint use of personnel, facilities, equipment, service or terminals shall provide for the apportionment of the common or joint expenses between the joint users thereof upon the basis of the provisions of Schedule A annexed hereto and made a part hereof, provided any service, work, material, equipment or operation provided, furnished, done or given by First Parties or either of them for or to the Third Party or by the Third Party for or to the First Parties or either of them shall be compensated for upon the basis of 100% of the general overhead expenses and 115% of the other direct expense, all as shown in said Schedule A.

1.3 Revenues from all shipments interchanged between McFADDIN and Adley shall be divided upon a prorate rate basis.

Ex. A-2, Management Contract.

1.4 All operation managed and conducted by Third Party of the business, affairs and property pursuant hereto shall be conducted in the name of and for the account of the First Parties respectively, and all funds and securities of the First Parties shall be held or deposited in separate accounts and shall be disbursed to the account of the First Parties upon their respective vouchers.

1.5 Nothing herein will authorize the Third Party to, and the Third Party hereby covenants that it will not in any way, change the business or operations of the First Parties during the term hereof and so that at the end of the term hereof the control and management of the business, property and affairs of the First Parties can be returned to the Second Parties in substantially the same condition as upon the date that the management was delivered to the Third Party, except for such changes therein as shall result in the ordinary and usual course of conducting the business of First Parties.

2. During term hereof, ADLEY may advance to First Parties or either of them amounts necessary for working capital or for the payment or discharge of expenses, liabilities and obligations of such First Parties or either of them accruing either before or during the term hereof, taking as security appropriate liens upon property of the First Parties for whose account such advance is made. Any amount so advanced shall be repaid by such First Party receiving the same on or before 5 years after the end of the term in equal annual installments over a period of 5 years, the first installment being payable within sixty days after the termination of this contract, with interest at 5% per annum, providing that the payment upon all said installments shall be secured by a lien of the highest possible priority on all of the then property of the First Party.

Ex. A-2, Management Contract.

3. It is recognized by both parties that ADLEY will be controlling, managing and directing First Parties hereunder pursuant to and at the request of First and Second Parties and for the mutual benefit of the parties as herein provided, and it is accordingly expressly agreed by the First and Second Parties, and each of them, that neither ADLEY nor the First Parties, or either of them, shall be liable for any loss or damage to such First or Second Parties or either of them arising from the performance in good faith by ADLEY of any of its powers, duties and obligations hereunder.

4. The Second Parties have caused all of the shares of the capital stock of the First Parties to be transferred upon their respective books at Fairfield County Trust Company, Stamford Branch, Stamford, Connecticut, as Escrow Agent, together with the executed and undated resignations of all officers and directors of First Parties. The said Escrow Agent, upon written demand of ADLEY at any time during the term hereof, shall accept any or all of said resignations, shall call regular or special meetings of stockholders of said First Parties for the purpose of considering such proposals as ADLEY shall designate and shall give ADLEY proxies and powers of attorney to vote all of said shares at all of said stockholders' meetings for the election of officers or directors or for any other matters consonant with the terms and conditions of this contract.

Upon consummation of the Contract of Sale of even date herewith between the Second Parties as Sellers and the Third Party as Purchaser pursuant to the terms and conditions thereof, whether such consummation be by the Third Party or by the Third Party's assignee, the Escrow Agent shall assign, set over and deliver to the Third Party or its assignee, as the case may be, all of the deposited

Ex. A-2, Management Contract.

shares. Upon termination of this Contract under any other conditions, the Escrow Agent shall return the deposited shares to the Second Parties.

5. The term of this lease shall continue for a period of 180 days from the effective date of any order of the Commission authorizing the same, or to such earlier or later date as shall be ordered by said Commission, and unless otherwise ordered by said Commission until a final order is made by said Commission disposing of the Third Party's application for authority to acquire through ownership of capital stock control of the First Parties.

6. In full consideration of all services rendered by it in controlling, managing and directing First Parties, ADLEY, in each year of the term, shall receive \$1.00.

This agreement shall be binding on the heirs, successors and assigns of the respective parties hereto.

IN TESTIMONY WHEREOF, the First Party has hereunto set his hand and seal, The Adley Express Company, its corporate name by its officer thereon and caused the same to be attested by its secretary under its corporate seal.

(SEAL)

McFADDIN EXPRESS, INC.

ATTEST:

By s/Louis DeBerardinis, Jr.

s/ Ralph R. Boddy
Secretary

(SEAL)

L & L TRUCK LEASING CORPORATION

ATTEST:

By s/Henry DeBerardinis

s/ Ralph R. Boddy
Secretary

50a

Ex. A-2, Management Contract.

LOUIS DeBERADINIS, JR.

s/Louis DeBeradinis, Jr.

s/Henry DeBeradinis

HENRY DeBERADINIS

(SEAL)

ATTEST:

s/ Ralph J. Adley
Secretary

THE ADLEY EXPRESS COMPANY

By s/M. L. Adley

*Ex. A-2, Management Contract.***SCHEDULE A**

Common or joint expenses incurred pursuant to the management of McFaddin Express, Inc., and L & L Truck Leasing Corporation by The Adley Express Company shall be apportioned and borne by the parties upon the following basis:

1. *Direct Line Haul Express:* Upon the basis of the net ton miles of freight respectively transported in common operations for each of the Parties;
2. *Direct Pickup and Delivery Expense:* Upon the basis of net tons picked up and delivered for each party in the common operations;
3. *Direct Billing and Collecting Expense:* Upon the basis of the number of shipments respectively received and/or delivered at the terminal and the terminals commonly used by the operations;
4. *Direct Platform Handling Expense:* Upon the basis of the tons respectively platformed for each.
5. *General Overhead Expense:* Upon the basis of the operating revenues of each.

As used in this Schedule the following terms shall have the following meaning:

1. *Account No.* refers to an account of that number in the Uniform System of Accounts for Class I Common and Contract Carriers prescribed by the Interstate Commerce Commission in effect on date hereof;
2. *Direct Line Haul Express* includes amounts chargeable to "Repairs and Servicing—Line Haul Equipment, "Account No. 4131; "Tires and Tubes—Line Haul Equipment, "Account No. 4161; "Drivers and Helpers, "Account No. 4231; "Fuel for Line Haul Equipment," Account No.

Ex. A-2, Management Contract.

4251; "Oil for Line Haul Equipment," Account No. 4261; "Depreciation Expense of Line Haul Equipment," Account Nos. 5021 and 5030; "Gasoline, Other Fuel and Oil Taxes—Line Haul Equipment," Account No. 5211; "Vehicle License and Registration Fees—Line Haul Equipment," Account No. 5221; "Equipment Rents Intercity," "Accounts Nos. 4271, 4272 and 4273.

3. *Direct Pickup and Delivery Expense* includes amounts chargeable to "Repairs and Servicing—Pickup and Delivery Equipment," Account No. 4135; "Tires and Tubes—Pickup and Delivery Equipment," Account No. 4165; "Drivers and Helpers—Pickup and Delivery," Account No. 4231; "Fuel for Pickup and Delivery Equipment," Account No. 4255; "Oil for Pickup and Delivery Equipment," Account No. 4265; "Equipment Rents—Pickup and Delivery Account Nos. 4275, 4276 and 4277; "Depreciation Expense of Pickup and Delivery Equipment," Account No. 5025; "Gasoline, Other Fuel and Oil Taxes," Account No. 5025; "Gasoline, Other Fuel and Oil Taxes," Account No. 5215; "Vehicle License and Registration Fees—Pickup and Delivery Equipment," Account No. 5225.

4. *Direct Billing and Collecting Expense* includes amounts chargeable to Account 4312, "Salaries and Fees, Billing and Collecting"; Account No. 4313, "Other Office Employees"; and Account No. 4320, "Office and Other Expenses".

5. *Direct Platform Expense* includes amounts chargeable to Account No. 4340, "Salaries and Wages of Platform Employees" and Account No. 4350, "Other Terminal Employees".

6. *General Overhead Expense* includes amounts chargeable to Account 4400, "Traffic," and Account 4600, "Administrative and General."

Ex. D, Copy of I.R.S. Letter to Adley.

227 Bedford Street
Stamford, Connecticut

September 14, 1959

The Adley Express Company
216 Crown Street
New Haven, Connecticut

Attention: Mr. Richard J. Simons

Re: McFaddin Express, Inc.

Gentlemen:

In a telephone conversation between Mr. Simons and Group Supervisor David I. Kennedy, about a week ago, it was understood that your company was to pay the monthly installments in the amount of \$3,500.00 each under the agreement made with McFaddin Express, Inc.

The payment due for August 1959 has not yet been received and the September payment will be due the 15th of this month.

Will you please advise me if it is your intention to meet these payments and, if so, when we may expect a remittance.

Very truly yours,

/s/ H. J. Beach

H. J. Beach
Revenue Officer

Exs. E and F, D'Ambrosio Testimony.

Tuesday, June 19, 1968

Mr. Weiss: Your Honor, at my request Mr. Cooney has agreed to interrupt Mr. DeBerardinis' testimony because we have a witness from the Internal Revenue and we have agreed to put him on.

MICHAEL D'AMBROSIO of 39 Sunrise Hill Drive, West Hartford, Connecticut, called as a witness, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Weiss:

Q. Mr. D'Ambrosio, are you employed at present by the Internal Revenue Service of the United States?

A. I am.

Q. And were you so employed in the year 1959?

A. I was.

Q. And can you tell us in what position you were employed in the year 1959 and the duties of your position, generally?

A. In 1959 I was the Assistant Chief of the Delinquent Accounts and Returns branch of the Internal Revenue Service, Hartford. My duties were to supervise and manage the functions of the Delinquent Accounts and Returns branch.

Q. Does that include efforts to collect delinquent accounts?

A. Yes, sir, that is our principal function.

Q. Now, do you recall whether at some time after May, 1959 you had occasion to have a meeting with any officials of the Adley Corporation?

A. Yes, I do.

Q. Can you tell us with whom you met?

A. Mr. Simons.

Exs. E and F, D'Ambrosio Testimony.

Q. Was that Mr. Richard Simons?

A. Mr. Richard Simons who was at that time the Vice President and general counsel of the Adley Trucking Company, the Adley firm.

Q. And at this meeting he was present?

A. Yes, sir.

Q. And you were present?

A. Yes.

Q. Was anybody else present at that meeting?

A. Mr. David Kennedy who was the supervisor of our delinquent accounts for the Stamford territory.

Q. And where did that meeting take place?

A. There was another man at the meeting, Mr. Beach who was the revenue officer to whom this case was assigned for collection.

Q. And where did that meeting take place?

A. In Mr. Simons' office in the Adley building in New Haven.

Q. And do you remember approximately when the meeting took place?

A. Yes. It was immediately after Adley and McFaddin entered into a contract to manage the McFaddin affairs and the contract to buy the Adley business—excuse me, the McFaddin business.

Q. Do you recall at all what month in 1959 that was, and I call to your attention that there is evidence in this case that Adley took over the control of McFaddin on May 25, 1959?

A. My best recollection is that it was late June or early July.

Q. Of 1959? A. That's right.

Q. Now, can you tell us what transpired at that meeting?

A. Well, our purpose in going to the Adley people was to find out if the Adley people were aware of the taxes

Exs. E and F, D'Ambrosio Testimony.

that McFaddin owed and to determine what we could expect in the way of payments on this account.

Q. And what happened at the meeting?

A. We informed Mr. Simons that these taxes were owed and we wanted to know from them, the Adley people, what their intentions were in regard to the taxes, delinquent taxes.

Q. Did Mr. Simons reply to you?

A. Yes, he did. He told us that they would continue the arrangement that we had with McFaddin to pay \$3,000 a month for—I don't know how many months—it was just a few months, and then the payments would increase to \$3,500 a month.

Q. I see. Now, thereafter do you know whether or not any of those payments were in fact made by Adley?

A. My best recollection is that—I think they made two payments.

* * * * *

Cross-Examination by Mr. Cooney:

Q. Now, you yourself were familiar with the circumstances under which Adley was temporarily operating McFaddin under an ICC permission, were you not?

A. Yes, sir.

Q. And the Internal Revenue Service, or you as a part of the Internal Revenue Service knew that temporary operation did not call for a merger of McFaddin into Adley—

Mr. Weiss: I'll object to the question.

The Court: I don't think he has finished.

Mr. Cooney: It's preliminary.

The Witness: I don't recollect that it called for a merger.

Q. There was no obligation that Internal Revenue saw for Adley to pay the obligations of another taxpayer?

Exs. E and F, D'Ambrosio Testimony.

A. Yes.

Q. Then did you collect the taxes from Adley, which was and is a solvent organization, if they were obligated?

A. Adley paid us one or two payments of \$3,000 each.

Q. Was that by virtue of any obligation to pay the Internal Revenue Service that the Internal Revenue Service claimed payment? A. Yes.

Q. Then you believe that the Internal Revenue Service was entitled to collect the taxes from Adley?

A. Yes, sir.

Q. Why didn't they? This would be a big bonanza for the Internal Revenue Service, wouldn't it?

A. I don't think so.

Q. Well, is it your position now that Adley was obligated to pay the taxes to Internal Revenue?

A. Under the management contract.

Q. Under the management contract. And does this call for any use of Adley's funds to pay the obligations of McFaddin to Internal Revenue Service that you know of?

A. When we talked to Mr. Simons he indicated that these payments would continue.

Q. McFaddin payments would continue—

Mr. Weiss: Had you finished your answer?

The Court: Just a minute. You shouldn't instruct him any more than Mr. Cooney. Had you finished your answer?

The Witness: Yes.

Q. Let's go back. McFaddin had entered into an arrangement to make monthly payments on its obligations to IRS? A. Yes.

Q. When Internal Revenue heard that Adley was temporarily operating McFaddin under permission from ICC you raised the question of whether the McFaddin payments were going to continue, isn't that right?

Exs. E and F, D'Ambrosio Testimony.

A. Yes, sir.

Q. And you were told by Mr. Simons that the McFaddin payments would continue?

A. Yes, sir.

Q. And you knew that Adley was operating McFaddin?

A. Yes, sir.

Q. And any payments on McFaddin's account had to come out of McFaddin's operation?

A. I don't know that.

Q. Isn't that what Mr. Simons told you?

A. Mr. Simons told us, to my best recollection, that Adley would see that we got our payments each month.

Q. As long as they operated McFaddin?

A. He didn't say that.

Q. Now, did you present him any documents to sign?

A. Not to my recollection.

Q. And Internal Revenue has never claimed that Adley is responsible for this delinquent tax . . . , has it?

A. No, sir.

* * * * *

Q. Now, in the first quarter of '58 there was a tax liability for excise which was substantially paid, is that correct?

A. According to this document, yes.

Q. Now, when the Government or IRS files its liens it covered all present and future acquired property. There were certain motor vehicles which were being financed and were on conditional sale. Do you have a list of the lienors who repossessed those vehicles?

A. I don't have it here.

Q. It's available?

A. I'm not acquainted with the fact whether it's available or not; I don't know whether we have it or not. I don't have it here.

Q. Let me go back to see what information we have. I

Exs. E and F, D'Ambrosio Testimony.

think we are all agreed that whatever vehicles the taxpayer had at that time were covered by the lien which was filed which you told us about.

A. Yes, sir.

Q. And anyone who had sold the vehicle which was still being financed could repossess his vehicle subject to the lien, is that right?

A. So I understand you, you mean the original vendor has a right to repossess?

Q. Let's say Strick Trailer Company had sold a truck on which they might have only received two or three payments. They have a right to repossess that, haven't they?

The Court: Subject to the tax.

Mr. Cooney: Subject to the tax lien.

Q. Now, did the Internal Revenue make a list of vehicles which were repossessed?

A. Not to my knowledge.

Q. Wouldn't it, in the ordinary course of practice, have to do so to determine whether or not the lienor was getting some equity which had inured to IRS?

A. The answer to that is no.

Q. In other words, you just let me repossess it and assume it is all right?

A. Unless we have information to the contrary.

Q. Apparently where you're dealing with substantial equipment people you don't make an investigation of each item, is that fair to say?

A. Well, it is fair to say that as a general practice we don't do this because many times the vehicle would be beyond our reach and we wouldn't be able to locate it as such.

Q. You mean—you don't mean beyond your reach?

A. Beyond our reach.

Exs. E and F, D'Ambrosio Testimony.

Q. The long arm of Uncle Sam can reach everywhere.

The Court: Mexico, Canada?

Mr. Cooney: I don't think he means that.

The Witness: No, I don't mean that. We can't locate it.

Q. In any event, you are not aware of any schedules kept by IRS that show, first, all the equipment covered by the liens?

A. No, I would say we don't.

Q. And you don't have a list, then, of vehicles which were repossessed by lienors?

A. No, we don't, to my knowledge.

Q. Now, there's an interesting thing here, the Government filed its lien in '59 and yet it waited until '65 to sell the property liened. Do you know why that was?

A. Yes, sir.

Q. Why? A. We had assurance from the Adley people that Adley would pay this tax and we ran into litigation and at this point we decided to go forward with judgment against the taxpayer.

Q. But not against Adley, is that right?

A. No, the taxpayer McFaddin, not Adley. And this is a policy, that we don't seek judicial measures to collect the tax until we use all of the administrative remedies that are available and one of the administrative remedies in this case was to take possession and sell the assets of the McFaddin Company before we sought judicial remedy.

Q. You had been in touch with Mr. DeBerardinis, or your department had, through the intervening years, had you not?

A. Yes, sir.

Q. And he kept telling you that this was going to result in approval by the ICC and that Adley would take over his business, isn't that true?

Exs E and F, D'Ambrosio Testimony.

A. Yes, at a certain point this was our understanding.

Q. And the IRS sat by and let this equipment sit there from '59 to '65, isn't that true?

A. No, it's not true. We didn't know it was sitting there.

Q. You knew where to get it when you wanted to sell it, didn't you? A. Yes, sir.

Q. And this equipment, referring now particularly to the trucks, were left on the Adley premises at Orange. Was IRS aware of that?

A. At what point, sir? If you are talking about the day that Adley assumed management of the McFaddin business we then knew Adley was in possession of all the assets and was using them.

Q. You didn't know they were using them, did you? Do you have some document that shows you knew they were using them?

A. Only from the conference I attended with Mr. Simons when he explained to us how the equipment was being used and how this operation was going to be conducted under the management contract.

* * * * *

Ex. W, IRS Liens Filed with Town Clerk.**NAME OF TAXPAYER**

LOUIS D DEBERADINIS

RESIDENCE 8 WESTCOTT ROAD

STAMFORD, CONNECTICUT

CLASS OF TAX (Tax Return Form No.)	PERIOD ENDED (a)	ASSESSMENT DATE (c)	IDENTIFYING NUMBER (d)	UNPAID BALANCE OF ASSESSMENT (e)
Excise	12/31/57	1/13/61	1/61-543900	15,292.89
Excise	3/31/58	1/13/61	1/61-543901	296.28
WT	12/31/57	1/13/61	1/61-291918	46,490.77
WT	3/13/58	1/13/61	1/61-291919	39,680.73
WT	6/30/59	1/13/61	1/61-291920	34,055.59

PLACE OF FILING

TOTAL \$134,816.17

Town Clerk, Stamford, Connecticut

WITNESS my hand at Stamford, Connecticut, on this, the
18th day of April, 1961

SIGNATURE

S—~~Marion~~ J. Donohue,

TITLE

Revenue Officer

Ex. W, IRS Liens Filed with Town Clerk.

NOTICE OF FEDERAL TAX LIEN REFILING

IRS SERIAL NUMBER 06-15-F-68-1 RECORDER'S IDENTIFICATION

NO.

NOTICE FILED WITH Town Clerk, Stamford, Connecticut

DATE

TAXPAYER'S ADDRESS
(if different than shown above)

Martin J. Donohue Revenue Officer

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien G.C.M. 26419, C.B. 1950-51, 125.)

PART I—To be retained by recording office

The land affected hereby lies in Block — of the Stamford Block Map. Received for record Dec. 20, 1967 at 3:00 P.M. and recorded by

Louis A. Clapes, City and Town Clerk

Ex. 9, Affidavit of Debt by I.R.S.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL ACTION No. 13664

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOUIS D. DEBERADINIS, JR.,

Defendant.

AFFIDAVIT OF DEBT

Fredric Measer, being duly sworn, deposes and says:

1. That I am Acting Chief of the Special Procedures Staff of the Office of the District Director of Internal Revenue, Hartford, Connecticut and that I have complete official custody of the documents and records subsequently referred to in this affidavit of debt.

2. I further certify that I am completely familiar with the account of outstanding tax liability due from the defendant taxpayer, Louis D. DeBeradinis, Jr., Responsible Officer of McFadden Express, Inc. and that this liability is still due and owing from the defendant taxpayer, Louis D. DeBeradinis, Jr. as follows:

Ex. 9, Affidavit of Debt by I.R.S.

Type of Tax	Taxable Period	Liability Assessed	Accrued Interest to 2/13/75	Balance Due as of 2/13/75
Withholding & FICA (Form-2749)	2nd Qtr. 1959	\$34,055.59	\$28,776.97	\$62,832.56
			Lien & Release Fees 26.25	
				\$62,858.81

3. I further certify that said tax was assessed and notice and demand duly made upon Louis DeBeradinis, Jr., and that notice of Federal tax liens for this liabilities was filed as follows:

Type of Tax & Taxable Period	Date of Assessment & Notice & Demand	Place of Filing	Filing Date	Refiling Date
Withholding & FICA (Form-2749) 2nd Qtr. 1959	01/13/61	Town Clerk Stamford, Conn. Secretary of State Hartford, Conn.	4/18/61 12/8/65	12/20/67 (1st) 01/17/74 (2nd) 12/28/67 (1st) 01/18/74 (2nd)

4. Interest on the liability set forth accrues at a total daily rate of \$5.60 from February 13, 1975 to date of payment.

Fredric Measer L.S.
FREDRIC MEASER
Acting Chief, Special Procedures Staff
Internal Revenue Service
P. O. Box 2555
Hartford, Connecticut 06101

Notarized and sworn to before me this 3rd day of February 1975.

Edythe H. DeLoach
EDYTHE H. DELOACH, Notary Public
My Commission expires April 1, 1979

(58921)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

against

LOUIS D. DeBERADINIS, JR.,

Defendant-Appellant.

AFFIDAVIT
OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230. That on November 3, 1975, he served 3 copies of Appendix and 3 copies of Brief for Appellant

on

Chief of Appellate Section,
Tax Division,
Department of Justice,
Washington, D. C. 20530

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

.....
Sworn to before me this
3rd day of November, 1975

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977